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Via E-Mail and First Class Mail

Rebecca E. Kane
U.S. Environmental Protection Agency
Office of Enforcement and Compliance Assurance
MC 2222A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: **Comments of UARG and UWAG on EPA's Enforcement and Compliance History
Online Web Site**

Dear Ms. Kane:

On November 20, 2002, the Environmental Protection Agency ("EPA" or "the Agency") announced the availability of, and invited comments on, its pilot web site, Enforcement and Compliance History Online ("ECHO"). *See 67 Fed. Reg. 70079* (2002). The publicly accessible site, found at <http://www.epa.gov/echo>, contains searchable, facility-level enforcement and compliance information and extensive demographic data on facilities regulated under the Clean Air Act ("CAA"), the Clean Water Act ("CWA") and the Resource Conservation and Recovery Act ("RCRA").¹ The Utility Air Regulatory Group ("UARG") and the Utility Water Act Group ("UWAG") appreciate the opportunity to submit these comments to EPA.²

The member companies of UARG and UWAG take their responsibility for environmental compliance seriously. UARG and UWAG members are committed to protecting and preserving the environment of the communities in which they operate and in which their

¹ Although EPA has said that the site would be operational for a 60-day pilot period, the public comment period extension to March 31, 2003 apparently extended the pilot period. *68 Fed. Reg. 4777* (2003).

² UARG and UWAG are voluntary, nonprofit, *ad hoc* groups of individual electric utilities and national trade associations. UARG and UWAG participate collectively on behalf of their members in EPA's rulemakings under the CAA and CWA respectively and in related litigation that may affect the electric utility industry.

Rebecca E. Kane
March 31, 2003
Page 2

customers and employees live and work. In fact, UARG and UWAG member companies make significant investments in environmental compliance technology and in environmental projects that go well beyond CAA and CWA regulatory requirements.³

UARG and UWAG agree that communities, businesses, and State, local and Tribal governments should have access to information sufficient to allow them to effectively participate in managing human health and environmental risks, including information from EPA web sites. In fact, UARG and UWAG members also use data made available by EPA.

UARG and UWAG are concerned, however, that the ECHO web site in its current form contains data inaccuracies that will impede EPA's expressed goals for the site. Specifically, the data inaccuracies in ECHO undermine the public's ability to accurately "monitor environmental compliance in communities."⁴ Moreover, instead of corporations being able to "monitor compliance across facilities they own," they will more likely be spending time chasing down, and trying to ensure the correction of, faulty information.⁵ Investors seeking to "more easily factor environmental performance into decisions" may make decisions with significant economic impacts on the basis of erroneous information.⁶ UARG and UWAG are also concerned that the instant and easy access to facility and demographic data included in ECHO may be inconsistent with our nation's efforts to enhance homeland security.

In these comments, UARG and UWAG offer specific suggestions on how the Agency may preserve its stated information goals while ensuring that the data are accurate and that security issues are addressed. UARG and UWAG believe that these concerns are significant enough that the pilot web site should be temporarily suspended until the Agency addresses and incorporates changes designed to address these issues.

Section I of these comments addresses the two issues EPA directed specifically to members of the regulated community: (1) Are the facility reports contained in ECHO accurate? and (2) Is the error reporting process easy to use?⁷ As described below, the members of UARG and

³ In addition, as part of their voluntary community outreach programs, member companies often provide environmentally helpful information to their customers and hold community seminars on, among other things, energy and water conservation and environmentally-friendly waste disposal techniques.

⁴ ECHO, Frequently Asked Questions, <http://www.epa.gov/echo/faq.html>.

⁵ *Id.*

⁶ *Id.*

⁷ 67 *Fed. Reg.* at 70080.

Rebecca E. Kane
March 31, 2003
Page 3

UWAG have determined that ECHO contains inaccurate data and that the error reporting process is deficient. In addition to creating an unreasonable economic burden on the members of the regulated community as well as on State and local governments to seek out and correct errors that they find on the site, UARG and UWAG believe that the easy availability of inaccurate data to the public and the investment community may impose significant and unwarranted harm on the reputations and economic viability of the member companies. Thus, UARG and UWAG urge EPA to temporarily suspend the ECHO pilot program at least until EPA, State and local governments and the regulated community are assured that the data are proven sufficiently reliable. UARG and UWAG offer specific suggestions on ways that a web site can be fashioned so that inaccuracies can be corrected quickly and easily.

Section II of these comments discusses the potential homeland security risks raised by the easy access to sensitive information on ECHO. The federal government has undertaken major initiatives to ensure the safety and security of our communities. UARG and UWAG believe that ECHO has the potential to interfere significantly with these efforts. UARG and UWAG believe that alternative tools exist that would allow EPA to satisfy its information goal while preserving a secure and safe environment for our nation.

I. The Inaccuracies of ECHO Data and Problems with the Correction Process Substantially Outweigh Benefits to the Environment

In a Press Release, EPA characterized ECHO as “an innovative pilot information tool” that allows “anyone with access to the internet” direct access to the current environmental compliance record of more than 800,000 regulated facilities nationwide.”⁸ In order to be effective, however, it is EPA’s obligation to ensure (1) that the information ECHO makes publicly available is reasonably accurate and (2) that inaccurate information is corrected quickly. As the Office of Management and Budget, Executive Office of the President stated:

[T]he fact that the Internet enables agencies to communicate information quickly and easily to a wide audience not only offers great benefits to society, but also *increases the potential harm that can result from the dissemination of information that does not meet basic information quality guidelines.*⁹

⁸ EPA, Environmental News (Nov. 18, 2002).

⁹ OMB “Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies,” 67 *Fed. Reg.* 8452 (Feb. 22, 2002) (emphasis added). In response, EPA vowed to integrate the “principles of information quality . . . into each step of EPA’s development of information, including creation, collection, maintenance, and dissemination.” EPA 260R-02-008, “Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the

Rebecca E. Kane

March 31, 2003

Page 4

Unfortunately, in its current form, ECHO contains inaccuracies with no assurances that inaccuracies will be corrected quickly. These inaccuracies conflict with EPA's acknowledgement that it is obliged to assess the quality of information *before* it is released publicly.¹⁰

These inaccuracies and the deficient error reporting system create much more than a nuisance for UARG and UWAG; they have the potential to impose significant and unwarranted consequences on the reputations and financial conditions of the members. As EPA has recognized, the financial investment community pays close attention to a company's "corporate governance and management attitudes toward the environment in making investment decisions."¹¹ Accordingly, EPA stated that "public availability of information regarding environmental performance and compliance will result in market forces that can positively influence environmental behavior."¹² The opposite holds true as well.

Misinformation can impose unwarranted and undeserved economic penalties upon publicly-traded companies.¹³ The dissemination of inaccurate compliance data undermines the good-faith efforts by an investor-owned utility company to comply with all applicable environmental requirements and even to go beyond such requirements in order to enhance its reputation and

Environmental Protection Agency" at 3 (December 2002).

¹⁰ In its "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by the Environmental Protection Agency," EPA acknowledged its "new commitment to information quality" and stated that it plans to "[w]ork with the public to develop assessment factors that we will use to assess the quality of information developed by external parties, *prior to EPA's use of that information.*" *Id.* at 14 (emphasis added).

¹¹ EPA 300-N-01-008, *Enforcement Alert*, Vol. 4, Number 3, U.S. EPA Office of Enforcement and Compliance Assurance, Office of Regulatory Enforcement (October 2001).

¹² *Id.* The Agency indicated that it will begin implementing an "environmental liability initiative" which would list publicly on a web site those companies facing certain EPA actions. EPA stated that one purpose of publishing such a list is "to allow investors to examine the compliance record of such companies and to assess future environmental costs that might materially affect their economic performance." BNA *Daily Environment Report*, "New Initiatives to Encourage Disclosure of Environmental Costs and Liabilities" (Jan. 23, 2003).

¹³ Because of increasing investor interest in environmental issues, the reputation of a company as an "environmentally responsible citizen" has economic value. Data that inaccurately portrays a company as "out of compliance" with environmental requirements will damage that reputation and cause unwarranted economic harm on the company. *See, e.g.,* "Investor Interest in Corporate Social Responsibility on the Rise," *Calvert Online* (March 25, 2003), <http://www.calvertgroup.com>.

Rebecca E. Kane

March 31, 2003

Page 5

attractiveness to investors as an environmentally conscientious business. EPA is obligated to ensure that such consequences do not result from information on ECHO.

A. Data Inaccuracies

Even during the brief pilot period, members of UARG and UWAG have spotted errors within the ECHO database. These inaccuracies are no small matter. Market analysts may make recommendations based on inaccurate data. News organizations and citizens' groups may publicize apparent "violations." When these recommendations and stories are based on errors in the ECHO database, unwarranted harm to permittees' financial and environmental reputations and needless alarm by the public can occur.¹⁴

In their review of the facilities on the ECHO web site, members of UARG and UWAG have forwarded to us the following inaccuracies:¹⁵

- Facilities are listed as being "in violation" for the last 8 calendar year quarters (including the current quarter for which no data has yet been submitted by the facilities) *even though no Notices of Violation ("NOVs") or complaints were ever filed against them.*
- Retired facilities are listed as "in violation."
- Facilities that are currently the subject of on-going contested federal litigation or negotiations with State agencies are listed as "in violation" even though the compliance status of those facilities is in dispute.
- Although a facility may have come into compliance, because EPA or a State has not taken action to close the case the facility is shown as "out of compliance."
- Facilities are reported as "out of compliance" after the issuance of NOV's even though the matters were resolved without the filing of a complaint.
- The treatment of measurements below the detection levels of analytical methods is inconsistent and can show violations where the data itself shows no violations. For example, if an NPDES permit limits a pollutant to below the

¹⁴ In the short time the ECHO database has been available, UARG and UWAG members have identified two cases of inaccurate news stories based on ECHO or Permit Compliance System ("PCS") data. PCS data is cross-referenced into the ECHO database. ECHO, Frequently Asked Questions, <http://www.epa.gov/echo/faq.html>.

¹⁵ Because of the breadth and extent of information on the pilot web site, review of the data available takes a great deal of time, and this list is not comprehensive. UARG and UWAG member companies continue to review the site and may supplement this list as warranted.

Rebecca E. Kane

March 31, 2003

Page 6

detection level, sometimes the Discharge Monitoring Report (“DMR”) will report simply “ND” for “nondetect.” Sometimes the measurement will have a footnote giving the detection level, for example, “ND<0.1.” State agencies are inconsistent about how they enter such data into the Permit Compliance System (“PCS”). If the State records the “ND” as a zero, the PCS and the ECHO database will not show a violation. But if the State records it as the detection level or 0.1, ECHO may show a “violation” of the “no detection” limit. Because of inconsistencies in the way States enter data into the PCS, ECHO data is often inaccurate.

- The information on a facility lists the water body on which it is located and indicates if the water body is on the 303(d) list of “impaired waters.” As presented, this information may lead ECHO users to conclude that the permitted facility’s discharge is a cause of the impairment, which may not be the case at all.
- In some cases “violations” are shown for missed samples or other extremely minor mistakes for which the State in question does *not* issue NOVs.
- There seem to be differences in the meaning of “significant violator” for RCRA and the Clean Air Act, which will lead to confusion.
- There are cases showing that NPDES DMRs have not been submitted when in fact they have been.
- Numerous listed “violations” of state implementation plans, new source performance standards, and prevention of significant deterioration requirements on ECHO appear to be erroneous. One member company found that there were multiple errors for 60% of its facilities.
- There seem to be significant delays in the reporting of information. Sometimes a violation that was resolved in, for example, the third quarter of one year will still be reported as a violation in the first quarter of the following year. In some cases a State will make a mistake entering data from a DMR, and only months later will a “violation” show up on the ECHO database. This makes it difficult for the regulated community to check the accuracy of the information even if a permittee has the resources to check the ECHO database continually. Most companies do *not* have the resources to undertake this kind of continuous quality assurance/quality control review of EPA’s database.

Rebecca E. Kane

March 31, 2003

Page 7

- NPDES permits are not shown as renewed where appropriate, giving the appearance that a facility is operating under an expired permit.
- There is no direct link to the issuance of a renewed NPDES permit (which may include new or revised permit conditions indicating that the facility is currently in compliance).
- The database includes inaccurate information regarding the location of facilities. In some cases, the coordinates identifying the location of a facility are in error. In other cases, facilities are identified by EPA using their central office address, rather than the facility address, making demographics for those facilities incorrect. The addresses of many facilities and corporate headquarters are out of date, and zip codes are incorrectly reported.
- In at least two cases, where no pH sample was taken one month (perhaps because there was no flow to measure at the time) ECHO reported a "0" pH reading as a permit exceedance.
- Different permits for the same facility have different names for the facility. A search (by SIC code) for facilities in particular counties turned up two different variations each of the names for two different facilities plus a fifth entry with the name of the operating company.

B. Error Reporting Process

UARG and UWAG believe that there is a significant risk of harm to regulated entities that may result from easy and extensive access to inaccurate data. As discussed in more detail below, if EPA wants to develop a web site that would satisfy its stated goals of providing accurate information on the Internet, EPA should (1) provide State and local governments with the opportunity to review their information and confirm that it is accurate *before* it is included on the Internet; (2) include mandatory time limits for correcting reported errors and remove the inaccurate data from the web site pending resolution, (3) include an embedded disclaimer making it clear that the information on ECHO is not always accurate and is subject to revision at any time, (4) ensure that the error reporting process does not impose too heavy a time or paperwork burden on affected facilities, and (5) ensure that States and local governments are not burdened economically.

Rebecca E. Kane
March 31, 2003
Page 8

1. *State Involvement*

Although EPA states that ECHO was developed by EPA in partnership with the Environmental Council of the States ("ECOS"), some state agencies have expressed deep concern about the accuracy of the information on the site.¹⁶ The Indiana Department of Environmental Management ("IDEM"), for example, warned that the ECHO database may not be accurate because there are problems transferring current information from the State's databases into EPA databases, and there often is a lag between the time IDEM inputs new data into EPA's databases and the time that new data appears in ECHO.¹⁷ Similarly, the State of Florida reported that "based on a review by the Florida Department of Environmental Protection (DEP) the new [ECHO] website provides an inaccurate picture of Florida's environmental enforcement."¹⁸

The members of UARG and UWAG understand the data quality problems associated with transferring data from a State's to a federal database. In the late-1980s through the 1990s, for example, EPA made available to the public lists of "Violating Facilities" which purported to list electric utility operating power plants that were in violation of Clean Air Act requirements or on compliance schedules.¹⁹ Several facilities owned and operated by UARG members were

¹⁶ In an April 2001 Report to Congress, "State Environmental Agency Contributions to Enforcement and Compliance," ECOS states that "States are responsible for collecting nearly all -- on average 94 percent -- of the environmental quality data retained on each of six major EPA national data systems" *Id.* at 53. In that Report, ECOS identifies significant discrepancies between the States' enforcement and compliance data and EPA's portrayal of that data. *Id.* at 55. *See also*, R. Steven Brown and Erin Wuchte, "State Enforcement of Environmental Laws," *ECOS* (Winter 2000) which details problems in interpreting EPA data supplied to EPA by Indiana on RCRA ("The closest data are within about 4% error, but the widest difference is over 71%; the average difference is about 25%").

¹⁷ *See* IDEM website describing "EPA's New Searchable Compliance and Enforcement Database." <http://www.state.in.us/iden/communityinfo/echo.html>.

¹⁸ "EPA Compliance Data Misleading," Florida DEP Press Release (Nov. 20, 2002), <http://www.dep.state.fl.us>. Specifically, Florida DEP reported that its review of data in ECHO "revealed that of 117 facilities listed by EPA as in 'significant non-compliance,' 12 are reported in error, 29 are back in compliance, and 76 are under enforcement action by the state or EPA itself." *Id.* The Florida DEP expressed concern, therefore, that "[w]hile the goals of ECHO are admirable, reporting faulty or unverified information has the potential to mislead the public and cause erroneous changes to be made against facilities that are in compliance with state and federal regulations." *Id.*

¹⁹ *See, e.g.*, 51 Fed. Reg. 6469 (Feb. 24, 1986).

Rebecca E. Kane

March 31, 2003

Page 9

included on the lists even though many States and even some EPA Regional Offices confirmed to EPA Headquarters that certain of the listed facilities were never out of compliance or that previous compliance problems had been fully resolved. These inaccuracies continued for several years despite repeated attempts and pleas from the facility owners and operators and even from the States to EPA to correct the data.

The impact of being on the list of so-called “violators” mistakenly was significant. In addition to being improperly identified as a potential target for enforcement actions and citizen suits, these false violations made facilities ineligible for use in nonexempt Federal contracts, grants or loans.²⁰ Such a designation, even if incorrect, may also have affected bond ratings for utilities owned and operated by local governments. Moreover, the decisions made by potential investors in those companies may have been impacted by inaccurate information. To avoid similar problems with ECHO, UARG and UWAG believe that States should be given the opportunity to review and confirm that State information is accurate *before* it is included in the database.

2. Time Limits Must be Set to Correct Data Inaccuracies

One UARG/UWAG member company told us that an ECHO database error reported by that member to EPA Region IV was corrected within a week. EPA must ensure that timely response by every EPA Region is made a mandatory part of the ECHO error correction process. In order to do this, EPA needs to set a time limit by which it will respond to requests for correction of data. In public meetings about ECHO, EPA expressed the “hope” that inaccuracies will be corrected within 60 days from the time a mistake is reported. UARG and UWAG believe that 60 days is too long and that EPA should set a mandatory 15 day time limit. The experience of the member company with EPA Region IV demonstrates that errors can be corrected promptly. If the Agency is unable to meet a 15 day deadline, the data should be removed from the web site until the issue is resolved.

3. Disclaimers Should be Embedded on ECHO

Although it would certainly not preclude nor guarantee unwarranted reliance on misinformation, ECHO should have an embedded disclaimer on the web site making it clear to users that the information is not always accurate and is subject to revision at any time.

²⁰ See 50 Fed. Reg. 36188 (Sept. 5, 1985).

Rebecca E. Kane

March 31, 2003

Page 10

4. Paperwork Reduction Act Implications Should be Considered

EPA itself has identified “Known Data Problems” in some of the databases from which information is taken by ECHO.²¹ Similarly, as discussed above, States have reported that information from State databases are not transferred accurately to EPA databases. ECHO shifts onto the regulated community the obligation to seek out and to correct errors on the database. Many companies simply do not have the resources to review data entries every month and to send corrections to EPA. Thus, data inaccuracies may remain on the website and interfere with ECHO’s stated goals of providing useful information to interested stakeholders.²²

When it enacted the federal Paperwork Reduction Act (“PRA”), Congress made it abundantly clear that it meant to make federal agencies “more responsible and publicly accountable for reducing the burden of Federal paperwork on the public.”²³ The error reporting system set up by ECHO does not comply with congressional intent, and the site should be restructured to resolve this conflict.

5. Implications of Unfunded Mandate Should be Considered

Congress has recognized that agencies should be aware of and consider the costs of regulatory actions on State and local governments.²⁴ EPA’s ECHO web site creates economically burdensome new obligations on State and local governments to confirm whether data is correct or not with the media, citizen groups, and businesses (including perhaps financial organizations). UARG and UWAG believe that these burdens can cumulatively take up hundreds and perhaps thousands of hours a year in each affected government entity and that these costs are likely to outweigh any environmental benefits that ECHO may provide.

²¹ http://www.epa.gov/echo/about_data.html#known_problems

²² These circumstances pervert EPA’s often-expressed aim of ensuring a “level playing field” for regulated industries. By putting the cost of fixing agency errors on the regulated companies, EPA will most likely hurt those in the industry least able to match resources with better-financed competitors.

²³ 44 U.S.C. § 3501(1). Moreover, the PRA directs agencies to “identify and afford security protections commensurate with the risk and magnitude of the harm resulting from the loss, misuse, or unauthorized access to or modification of information collected or maintained by or on behalf of an agency.” *Id.* § 3504(g)(3). As discussed below, the data made available on ECHO raises such security concerns.

²⁴ See Unfunded Mandates Reform Act, 2 U.S.C. § 1501, *et seq.*

Rebecca E. Kane

March 31, 2003

Page 11

II. *Homeland Security Concerns*

A. *EPA's Obligations to Consider Security Issues*

Since the attack on the United States on September 11, 2001, EPA has made clear that it understands its obligation to consider national and local security issues in making decisions regarding whether or not to provide public access to information on Agency web sites. Accordingly, in an agency-wide request soon after September 11, EPA Headquarters asked those in the Agency responsible for disseminating information to identify potentially "sensitive" information, particularly "resources which provide information on chemicals, and/or location, and/or amounts, and/or impacts on the environment or human health."²⁵ EPA e-mailed an announcement to Envirofacts system users explaining that the Agency will no longer allow direct access to the Envirofacts databases.²⁶ EPA stated that, "[a]s part of our continuing efforts to respond to Homeland Security issues . . . Direct Connect access will no longer be available to the general public. Direct Control access to Envirofacts will only be available to U.S. EPA employees, U.S. EPA Contractors, the Military, Federal Government, and State Agency employees."²⁷ In testimony before Congress, EPA's Office of Information Analysis and Access said that the Agency "is aware that we need a balance between protecting sensitive information in the interest of national security and maintaining access to the information that citizens can use to protect their health and the environment in their communities."²⁸ Accordingly, before continuing to make sensitive data generally and widely available to anyone with access to the Internet (as the ECHO pilot web site does), EPA should first ensure that ECHO strikes the proper balance of providing such information and protecting security.

Other federal agencies limit access to sensitive data. For example, the Federal Energy Regulatory Commission ("FERC") announced a policy statement that in light of September 11,

²⁵ E-Mail from Emma McNamara, Director of EPA's Information Access Division of the Office of Information (2001).

²⁶ Envirofacts is an EPA database that allows users to retrieve information from a variety of EPA databases, such as information about air pollution, water pollution, chemicals at facilities, grants/funding, and toxics releases. For those users that wish to write their own queries, EPA set up "Direct Connect" passwords, allowing them access to the entire database.

²⁷ <http://www.ombwatch.org/article/articleprint/608/-1/97/>.

²⁸ Testimony of Elaine Stanley, Director, Office of Information Analysis and Access, Office of Environmental Information, before the Subcommittee on Water Resources and Environment of the Committee on Transportation and Infrastructure, U.S. House of Representatives (Nov. 8, 2001).

Rebecca E. Kane

March 31, 2003

Page 12

it was removing from instant public access previously public documents that detail the specifications of energy facilities licensed or certificated by FERC.²⁹ The policy statement directed requesters seeking this information to follow FERC's Freedom of Information Act ("FOIA") procedures. In a September 13, 2002, *Federal Register* notice, FERC broadened the policy to limit public access to "critical energy infrastructure information" that was previously public, including documents that contain specifications of *proposed* energy facilities.³⁰ FERC stated that "the proposed new access procedures complement existing rights under the FOIA. Requesters retain the right to file a FOIA request for any information not available through the Public Reference Room, the Internet, or publicly-accessible databases."³¹ Similarly, in 2001, the Nuclear Regulatory Commission ("NRC") took its entire website offline and then set up its newly redesigned public Web site using a phased approach following a thorough review of all information on the site.³²

The ECHO pilot web site allows anyone with access to the Internet to find information for approximately 800,000 facilities regulated as CAA stationary sources, CWA direct dischargers, and RCRA hazardous waste generators/handlers.³³ ECHO allows an Internet user to locate each of these facilities on a map and to obtain extensive demographic information about each of them. Specifically, ECHO provides information about the longitude and latitude of the facility, the density of the population surrounding the facility, the locations of churches and schools, local highway intersections with the facility, hazardous waste on site, description of the generation source with longitude and latitude of the boilers and turbines and ethnic profiles of the surrounding area (including race, income and literacy).³⁴

At least one UARG member was notified by the Nuclear Regulatory Commission that it should remove from its web site data about the location of nuclear facilities. ECHO, in contrast, makes such information easily accessible and available. Such inconsistencies are self-defeating. These concerns similarly apply to non-nuclear electric generating facilities which

²⁹ 66 *Fed. Reg.* 52917 (2001).

³⁰ 67 *Fed. Reg.* 57994 (2002).

³¹ *Id.*

³² See NRC Meeting Transcript, Jan. 30, 2002 at www.nrc.gov.

³³ <http://www.epa.gov/echo/faq.html>.

³⁴ Because of the sensitive nature of these data and the related security issues, UARG and UWAG have not included more specific details in these written comments regarding site-specific security concerns. However, we would be willing to discuss these concerns in confidence with EPA.

Rebecca E. Kane
March 31, 2003
Page 13

may have tanks of chlorine and ammonia on site. If EPA decides to continue to make the ECHO web site available, it should screen the data and remove any information that the federal government has deemed sensitive for purposes of protecting homeland security.

B. Freedom of Information Act Requirements

At the November 18, 2002, public meeting to discuss ECHO with interested stakeholders, EPA indicated that ECHO is an attempt to comply with the requirements of the Electronic Freedom of Information Act ("E-FOIA"). However, E-FOIA and guidelines recently issued by the United States Department of Justice ("DOJ") require EPA to consider national security before posting sensitive information in a searchable database on the Internet.

The major change made by the 1996 amendments to FOIA, known as E-FOIA, involved the maintenance of electronic reading rooms at which agencies would make three categories of records -- final opinions rendered in the adjudication of administrative cases, specific agency policy statements, and administrative staff manuals that affect the public -- routinely available for public inspection and copying.³⁵ In addition, the E-FOIA amendments provided a new category of records that are subject to "reading room" treatment -- records processed and disclosed in response to a FOIA request that "the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records."³⁶

The E-FOIA amendments, however, did not change the basic premise of FOIA that agencies may have a legitimate interest in *denying* access to certain classes of information. In pertinent part, for example, the provisions of E-FOIA do *not* apply to records that are:

specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy;³⁷ [and to]

. . .

records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be

³⁵ See 5 U.S.C. § 552(a)(2).

³⁶ *Id.* In addition, a general index of these previously-released records must be available. The intent is to reduce the number of multiple FOIA requests for the same records. See H.R. Rep. No. 104-795, at 19-20 (1996).

³⁷ 5 U.S.C. § 552(b)(1).

Rebecca E. Kane
March 31, 2003
Page 14

expected to endanger the life or physical safety of any individual

. . . .³⁸

Certain of the information now available in the pilot ECHO database is subject to these exceptions. For example, the information on ECHO, as its name discloses, “Enforcement and Compliance History Online,” was compiled for law enforcement purposes, and such information, if easily accessible, may endanger homeland security. If information is excepted under FOIA, it is EPA’s obligation to ensure that such records are not disclosed on the Internet.³⁹

As stated by Attorney General John Ashcroft in the Department of Justice’s “Statement of Administration Policy on the Freedom of Information Act,” the Administration’s FOIA policy emphasizes that it is committed to protecting “fundamental values that are held by our society,” including “safeguarding our national security,” and “enhancing the effectiveness of our law enforcement agencies, [and] protecting sensitive business information”⁴⁰ In determining whether or not to continue to make sensitive information available on ECHO, EPA is obligated to more fully consider the same types of security interests that it must consider when making information available in response to a FOIA request. Thus, EPA must consider that an interest of foremost importance in this post-September 11 world is protection of communities from the risk of terrorism and should “carefully consider the protection of all such values and interests when making disclosure determinations under the FOIA.”⁴¹

C. The Clean Air Act’s “Worst Case Scenario” Provides a Useful Template for ECHO

UARG and UWAG support EPA’s efforts to provide accurate and appropriate information regarding compliance and enforcement of environmental laws and believe that the removal of sensitive demographic information that may create a security risk will not interfere with those goals. In fact, UARG and UWAG believe that there are demonstrated safer and more secure ways of disseminating such information which would minimize the risk of its misuse.

³⁸ 5 U.S.C. § 552(b)(7).

³⁹ Consistent with EPA’s authority under FOIA, on May 6, 2002, President Bush granted the EPA Administrator authority to classify information which could be expected to damage national security as Top Secret, Secret, and Confidential. *See* E.O. 12958 (2002).

⁴⁰ Memorandum for Heads of all Federal Departments and Agencies, from John Ashcroft, Attorney General, “Freedom of Information Act,” (October 14, 2001).

⁴¹ *Id.*

Rebecca E. Kane
March 31, 2003
Page 15

In 1999, for example, Congress passed the Chemical Safety Information and Site Security and Fuels Regulatory Relief Act (“the Chemical Safety Act”), which provides public access to information about potential hazards associated with certain toxic chemicals. Notably, the Chemical Safety Act does this without providing a searchable database in an electronic format on the Internet.⁴² The Chemical Safety Act addresses the need for safeguards on the dissemination of sensitive data, while making data available to federal, state and local officials for emergency planning and response purposes as well as providing reading rooms through which the public can obtain information.

In creating this compromise between full electronic broadcasting and controlling the release of information with safety and security in mind, Congress heard from both environmental and public safety interests. Among other law enforcement and emergency response agencies, the Fraternal Order of Police submitted a statement to Congress, which stated:

As the nation’s largest law enforcement organization, our members, along with other emergency responders, have front-line responsibility for protecting the public from incidents involving hazardous materials, including those initiated by terrorist organizations. *The F.O.P. is strongly opposed to the dissemination of sensitive data over the Internet which can be useful to terrorists.*⁴³

The Department of Justice concluded that “public dissemination of certain portions of [Off-Site Consequence Analysis] data would create an increased risk that terrorists or other criminals will attempt to cause an industrial chemical release.”⁴⁴ The information, according to

⁴² PL 106-40 (codified in 42 U.S.C. § 7412 (r)) (August 5, 1999). The Chemical Safety Act was designed, in part, as a response to a position taken at that time by the DOJ that computer database records are “agency records” subject to FOIA. See “DOJ Report on ‘Electronic Record’ issues Under the Freedom of Information Act,” Senate Hearing 102-1098, 102d Cong., 2d Sess. P.33, 1992. In light of President Bush’s more recent May 6, 2002 Order (granting the EPA Administrator authority to classify information as “Top Secret,” “Secret” or “Confidential” for national security purposes), it may be possible now for EPA to exempt those parts of the database from FOIA disclosure.

⁴³ *The Chemical Safety Information and Site Security Act of 1999: Hearings Before the Subcommittee on Health and the Environment*, Prepared Statement of Sgt. Marty Pfeifer, National Trustee, Grand Lodge, Fraternal Order of Police (May 19, 1999) (emphasis added).

⁴⁴ DOJ, “Assessment of the Increased Risk of Terrorist or Other Criminal Activity Associated with Posting Off-Site Consequence Analysis Information on the Internet,” (April 18, 2000). It is notable that both this statement and that made by the Fraternal Order of Police

Rebecca E. Kane

March 31, 2003

Page 16

the DOJ, “would be helpful to someone seeking to cause such a chemical release because” the information on the Internet “would provide ‘one-stop shopping’ for refined targeting information, allowing terrorists or other criminals to select the best targets”⁴⁵

In order to strike a balance between public access to information and public security, EPA explained that the Chemical Safety Act

provides members of the public and government officials with access to that information in ways designed to minimize the likelihood of accidental releases, the risk to national security associated with posting the information on the Internet, and the likelihood of harm to public health and welfare.⁴⁶

The Chemical Safety Act provided procedures for members of the community and emergency response personnel to have access to information about potential environmental hazards and local facilities by using monitored and controlled reading rooms.

Although the information sought to be protected in the Chemical Safety Act was the “worst case scenario” analysis required by the Clean Air Act, the ECHO pilot web site has information which may similarly increase the “risk that terrorists or other criminals will attempt to cause an industrial chemical release.”⁴⁷ A user can navigate easily through ECHO to find specific information about a facility, including the demographics of the surrounding population, chemicals at the facility, and the facility’s exact location. The potential for abuse is substantial.

were made *before* the terrorist attacks on September 11, 2001 and the increased terror alerts that have followed.

⁴⁵ *Id.*

⁴⁶ “Accidental Release Prevention Requirements; Risk Management Programs Under the Clean Air Act Section 112(r)(7); Distribution of Off-Site Consequence Analysis Information; Final Rule,” 65 Fed. Reg. 48107 (August 4, 2000).

⁴⁷ In fact, UARG and UWAG members were able to use the ECHO database to obtain sensitive information about almost 500 facilities, including several Department of Defense and Department of Energy facilities. To protect security interests, UARG and UWAG do not include its findings in these comments, but its members are available to discuss these issues in more detail with the Agency.

Rebecca E. Kane

March 31, 2003

Page 17

In light of the risks associated with the searchable electronic format of ECHO, EPA should reassess the posting of such a database on the Internet.⁴⁸ If EPA believes that some information should remain available on the Internet, EPA should follow the template of the Chemical Safety Act and provide only restricted and monitored access to site-specific information that may pose any risk to homeland security.

III. Conclusion

UARG and UWAG support EPA's efforts to disseminate accurate information and understand that such dissemination helps further the Agency's goals of protecting the environment. UARG and UWAG are concerned, however, that wide and long-term dissemination of inaccurate data could cause significant harm to the public, government entities and regulated industry. ECHO can and should be reworked to ensure that errors do not appear on the site and are corrected quickly if they are spotted. In addition, UARG and UWAG believe that the dissemination of certain sensitive information may conflict with and impact our nation's efforts to protect homeland security. UARG and UWAG believe that there are ways to resolve these conflicting goals so that useful information is available without creating such risks.

Sincerely,



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⁴⁸ UARG's and UWAG's local government sector members are particularly concerned with this aspect of the ECHO data base.



Rebecca E. Kane
March 31, 2003
Page 18

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